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# In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1062

WILLIAM L. O'BRIEN ET AL.,
PETITIONERS,

*v.*

ROBERT J. DiGRAZIA,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

FRANK J. McGEE,
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

# In the
# Supreme Court of the United States.

No.

WILLIAM L. O'BRIEN ET AL.,
PETITIONERS

*v.*

ROBERT J. DiGRAZIA,
RESPONDENT

**Motion for Leave to File**
**Petition for Writ of Certiorari.**

Now come the petitioners and respectfully move this Court for leave to file the annexed petition for writ of certiorari under § 1254(1) of Title 28, United States Code, directed to the United States Court of Appeals for the First Circuit, to review an order and judgment of that Court entered on November 8, 1976, and more particularly described in the petition, and for such other and further relief as may be just and proper.

Respectfully submitted,
The petitioners, by their attorneys,
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# In the Supreme Court of the United States.

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WILLIAM L. O'BRIEN ET AL.,
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ROBERT J. DiGRAZIA,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

The petitioners, William L. O'Brien, Vincent J. O'Neil and Edward P. Connelly, police patrolmen in the City of Boston, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit, rendered in these proceedings on November 8, 1976.

## Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix B, *infra*, pp. 4a-8a. The opinion of the United States District Court for the District of Massachusetts, also unreported, appears at Appendix A, *infra*, pp. 1a-3a.

## Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit (Appendix B, *infra*) was rendered on November 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented.

1. Whether the decision of the United States Court of Appeals for the First Circuit, affirming the judgment of the District Court, permitting use of financial questionnaires regarding the petitioners, and their families, by the respondent, and granting respondent's motion to dismiss, violates petitioners' right of privacy set forth in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), and *Roe* v. *Wade*, 410 U.S. 113 (1973).
2. Whether the decision of the United States Court of Appeals violates the petitioners' Fifth Amendment privilege against self-incrimination in light of the standards enunciated by this Court in *Gardner* v. *Broderick*, 392 U.S. 273 (1968).
3. Whether the decision of the United States Court of Appeals denied the petitioners' right to due process of law, guaranteed by the Fourteenth Amendment, in sustaining respondent's dual role in ordering petitioners to answer the financial questionnaires and adjudging their failure to do so.



## Constitutional Provisions Involved.

CONSTITUTION OF THE UNITED STATES,
AMENDMENT IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONSTITUTION OF THE UNITED STATES,
AMENDMENT V.

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

CONSTITUTION OF THE UNITED STATES,
AMENDMENT XIV.

"SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

## Statement of the Case.

The facts in this case are not in dispute. The petitioners are Boston Police patrolmen who, in 1973, were suspended without pay for thirty days by the respondent Boston Police

Commissioner for failure to respond to certain financial questionnaires prepared by the Commissioner's Office (Appendix C, *infra*, pp. 9a-11a). The questionnaires sought information as to all sources of income in 1972 for the officers and their spouses, all substantial assets owned by them or members of their household, and, for the period 1966-1971, an estimate of their expenditures and copies of their federal and state income tax returns. The suspensions followed a hearing at which the Commissioner presided.

Seeking damages, and injunctive and declaratory relief, the petitioners filed an action in the United States District Court for the District of Massachusetts under 42 U.S.C. § 1983 on April 17, 1973, alleging violation of their civil rights. On April 20, the District Court denied the patrolmen's request for a preliminary injunction. In an opinion dated June 2, 1975, the District Court granted the respondent Commissioner's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) (Appendix A, *infra*, pp. 1a-3a).

On appeal, the United States Court of Appeals for the First Circuit affirmed the decision of the District Court in an opinion issued November 8, 1976 (Appendix B, *infra*, pp. 4a-8a). In its opinion, the Court of Appeals noted that the District Court was in error in considering the Commissioner's motives for issuing the disputed questionnaires, but that the error was not fatal. The Commissioner had issued the questionnaires to the petitioners when a list of surnames, including the petitioners' surnames, was found in the possession of a man linked to organized crime.



## Reasons for Granting the Writ.

### I. The Opinion of the Court Below Conflicts with This Court's Opinion in Griswold v. Connecticut, 381 U.S. 479 (1965).

This Court has found broad constitutional support for a right to privacy, for an individual's right to be free from unwarranted governmental intrusion. *Griswold* v. *Connecticut, supra.*

> "Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" *Id.* at 484.

"In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe, supra*, 410 U.S. at 152.

More recent decisions have confirmed the continuing viability of a right to personal privacy. *Roe* v. *Wade*, 410 U.S. 113 (1973). The Court of Appeals, however, purported to find little personal privacy in financial affairs, finding a similarity between the disputed questionnaires and the petitioners' Internal Revenue Service tax returns. Mr. Justice Powell, however, joined by Justice Blackmun in a concurring opinion in *California Bankers Association* v. *Shultz*, 416 U.S. 21 (1974), has expressly recognized that governmental intrusion into matters of personal finances would, at some point, "implicate legitimate expectations of privacy." *Id.* at 78-79. Moreover, the legitimacy granted to investigation by the Internal Revenue Service into personal finances, backed by the authority of Congress, vastly overshadows justifications claimed on an ad hoc basis for similar investigation by the Police Commissioner.

## II. The Opinion of the Court Below Misapplied the Standards Set Forth by this Court in Gardner v. Broderick, 392 U.S. 273 (1968).

In the *Gardner* case, *supra*, this Court defined the limits of protection against self-incrimination afforded by the Fifth Amendment to public employees. Such protection was not available where the employee faced dismissal because he "refused to answer questions *specifically*, *directly*, and *narrowly* relating to the performance of his official duties. . . ." *Id.* at 278 (emphasis added). The Court of Appeals found the questionnaires to fit within those limits, despite the fact that petitioners were asked to account not only for their own finances, but for the financial affairs of their spouses and members of their household as well. Furthermore, the questionnaire asked for information covering a six-year span. The test in *Gardner*, *supra*, is not mere relevancy of the questions to job performance, but a showing of a narrow, direct and specific relationship. In permitting sweeping questions merely upon the "hint of police corruption" (Appendix B, p. p. 8a), the Court of Appeals created a ready-made justification for any financial inquiry by the Commissioner, and eliminated any incentive for the Police Commissioner to observe the *Gardner* limits.



The Court of Appeals seems to have applied a test of relevancy alone to determine the propriety of the Commissioner's questionnaires. The *Gardner* test is designed to ensure that the public employee be accountable only for his own job-related actions. However much the *Gardner* Court reduced the zone of privacy surrounding a police officer's off-duty life, it did not eliminate it. The Commissioner must show a narrow, direct, and specific relationship between his questions and the officer's official duties, not merely that there may be some sort of relationship.

It may be assumed, for purposes of argument, that the finances of an officer's spouse and members of his household are relevant to an inquiry into the patrolman's official conduct. Yet such an inquiry is a violation of the zone of privacy preserved for police officers by the *Gardner* decision. The Commissioner's questionnaires make the officer accountable for the conduct of his wife and the members of his household, who may be adult offspring. The officer is made liable for improprieties that may have been committed by his family, even if the officer himself is ignorant of any such conduct. Conversely, the officer's family and household members lose their privacy rights, even though they may have done nothing wrong, and have had nothing to do with the officer's professional actions.

Even though the incident giving rise to the issuance of the questionnaire occurred in 1972, the Commissioner requested financial information for the prior six years. The decision of

the Court of Appeals found nothing objectionable in the number of years covered by the questionnaire, even though the Commissioner offered no explanation as to the relevance of an officer's financial status in 1966 to an incident arising in 1972. Because the Court of Appeals articulated no standard in this regard, nothing in its decision would prevent the Commissioner from demanding a ten- or fifteen-year financial history, no matter how burdensome to the officer.

### III. The Opinion of the Court Below Failed to Secure to Petitioners the Due Process of Law under the Fourteenth Amendment.

The Court of Appeals voiced its approval of the Commissioner's action in ordering the questionnaire, and then presiding over the hearing resulting from petitioners' refusal to fill it out. The Court of Appeals required a showing of actual bias on the part of the Commissioner, but that bias was already present where the Commissioner was asked to examine the legality of his own order at the hearing over which he presided; his decision was a foregone conclusion since he obviously would not have issued the order had he thought it invalid. "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).



### Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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**Appendix A.**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

WILLIAM L. O'BRIEN, ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
No. 73-1190-S

ROBERT J. DiGRAZIA,
DEFENDANT.

**Memorandum and Orders on Defendant's Motion to Dismiss**

*June 2, 1976*

SKINNER, D.J.

This is an action under 42 U.S.C. § 1983 in which the plaintiffs, three Boston policemen, claim that their suspension without pay by the defendant Police Commissioner for failure to complete financial questionnaires violates their civil rights. The questionnaires seek information relative to the policemen's financial condition, including, but not limited to, a listing of all sources of income, copies of federal and state tax returns, bank statements, bank books, deposit slips, brokerage accounts and an itemization of the cost of living for each of the years in question. The questionnaires were submitted by the defendant following his receipt of information that the last names of the plaintiffs were found on a list in the possession of a man known to police to be involved in organized crime.

The Complaint seeks a permanent injunction and a declaration that the action of the defendant is unconstitutional, in violation of plaintiffs' civil rights, and specifically violates their right to privacy. Additionally, plaintiffs claim that the hearing at which they were suspended violated their right to due process of law by virtue of the fact that the defendant diGrazia was not an impartial trier of fact in proceeding to enforce his own order.

Plaintiffs' motion for a preliminary injunction was denied by Chief Judge Caffrey. The matter is presently before me on defendant's motion to dismiss for failure to state a cause of action and for a lack of subject matter jurisdiction.

Exhaustion of state administrative remedies is not generally required in § 1983 actions. *Wishart* v. *McDonald*, 500 F. 2d 1110, (1st Cir. 1974); *Raper* v. *Lucey*, 488 F. 2d 748 (1st Cir. 1973); *Cintron* v. *State Board of Education*, 384 F. Supp. 674 (D.P.R. 1974). The only requirement is that the action be ripe for adjudication in that there must be a definitive administrative or institutional determination before a § 1983 action may arise. *Raper* v. *Lucey*, *supra* at 751, fn. 3.

Plaintiffs in the instant case were suspended without pay for one month for failure to complete their questionnaires. This action was taken following a hearing conducted by the defendant. Thus, plaintiffs present to the Court a controversy ripe for adjudication, even though there are still avenues of appeal open within the state system.

I now turn to defendant's motion to dismiss for failure to state a claim upon which relief can be granted. In *Gardner* v. *Broderick, Police Commissioner of the City of New York, et al.*, 392 U.S. 273 (1968) and *Uniformed Sanitation Men Assn., Inc., et al.* v. *Commissioner of Sanitation of the City of New York, et al.*, 392 U.S. 280 (1968), the Supreme Court established "a procedural formula whereby . . . public officials may now be discharged for refusing to divulge appropriate



information pertinent to the faithful performance of their offices. . . ." *Gardner* v. *Broderick, Police Commissioner of the City of New York, et al., supra,* and *Uniformed Sanitation Men Assn., Inc., et al.* v. *Commissioner of Sanitation of the City of New York, et al., supra,* concurrence of Harlan J., 392 U.S. at 285. The actions of the defendant Police Commissioner in the case at bar fully comply with the Court's decisions in *Gardner* and *Uniformed Sanitation Men Assn.* In accord, *Fahy* v. *Commission to Investigate Allegations of Police Corruption*, 319 N.Y.S. 2d 242 (1971). See also *Broderick* v. *Police Commissioner of Boston*, 75 A.S. 1838, 330 N.E. 2d 199 (1975); *Silverio* v. *Municipal Court of the City of Boston*, 355 Mass. 623 (1969).

Similarly, there is no cause of action for a violation of plaintiffs' right to privacy, *Illinois State Empl. Assoc.* v. *Walker*, 57 Ill. 2d 512, 315 N.E. 2d 9 (1974); *Fritz* v. *Gorton*, 83 Wash. 2d 275, 517 P. 2d 911 (1974), or due process of law. *Withrow* v. *Larkin*, 421 U.S. 35 (1975).

Accordingly, the defendant's motion to dismiss is ALLOWED.

WALTER JAY SKINNER
*United States District Judge*

Appendix B.

# United States Court of Appeals for the First Circuit

No. 76-1292

WILLIAM L. O'BRIEN, ET AL.,
PLAINTIFFS, APPELLANTS,
*v.*
ROBERT J. DiGRAZIA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

*Frank J. McGee* on brief for appellants.
*Lawrence J. Ball*, Special Assistant Corporation Counsel, and *Michael DeMarco*, Counsel to the Police Commissioner, on brief for appellee.

November 8, 1976

COFFIN, *Chief Judge*. The district court allowed the defendant's motion to dismiss for failure to state a claim and the plaintiffs appealed. Fed. R. Civ. Pro. 12(b)(6). Given this posture of the case, we accept as true all material allegations in the complaint. *Robinson* v. *Stanley Home Prods. Co.*, 272 F.2d 601 (1st Cir. 1959); 2A Moore's Federal Practice ¶ 12.08 (1975). Those facts may be simply stated. The plaintiffs are patrolmen in the Boston Police Department; the defendant is the Police Commissioner. In 1973, the Commissioner ordered the plaintiffs to complete a financial





questionnaire, listing all sources of income in 1972 for themselves and their spouses, all significant assets held by them and any members of their households, and, for the years 1966 through 1971; a general estimate of their expenditures and copies of their state and federal income tax returns.[1] The plaintiffs refused to supply this information. The Commissioner held a hearing and suspended them without pay for thirty days. The patrolmen now seek damages, an injunction, and declaratory relief. The gist of their claim is that these events violated "the constitutional and civil rights of the plaintiffs". They refer specifically to the Fourth, Fifth, Seventh, and Fourteenth Amendments, and to the "right of privacy".

In evaluating this complaint, the district court relied on one further fact, that the Commissioner demanded this financial information only after he was given cause to suspect the patrolmen's integrity; their names were apparently found on a list in the possession of a man known to be involved in organized crime. While the reasons behind the Commissioner's order are relevant, the court erred in considering them, for they are not set out in the complaint, and this was a motion to dismiss for failure to state a claim.[2] *See Costen* v. *Pauline's Sportswear, Inc.*, 391 F.2d 81, 85 n. 5 (9th Cir. 1968); *Erlich* v. *Glasner*, 374 F.2d 681 (9th Cir. 1967). But the court's decision should not be set aside if its dismissal of the case can be justified without reference to the Commissioner's reasons. *Cf. O'Brien* v. *Moriarty*, 489 F.2d 941 (1st Cir. 1974).

[1] The questionnaire is attached to, and we treat it as part of, the complaint. *See Mengel Co.* v. *Nashville Paper Prods. & Specialty Workers Union, No. 153*, 221 F.2d 644, 647 (6th Cir. 1955).

[2] Undisputed facts outside the complaint may of course be considered if the motion to dismiss is treated as one for summary judgment. 5 Wright & Miller, Federal Practice and Procedure § 1366 (1969). But this route was not followed by the court below, nor was it suggested by the defendants on appeal. *Cf. T.M.T. Trailer Ferry, Inc.* v. *Union de Tronquistas de Puerto Rico, Local 901*, 453 F.2d 1171 (1st Cir. 1971).

The plaintiffs attack the financial questionnaire as an invasion of their privacy. In appealing to a broad constitutional "right of privacy", the plaintiffs seek a shelter of more limited parameters than the commodious label suggests. The Supreme Court in its occasions to deal with the concept of privacy has seemed to refer to autonomy. *See, e.g., Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); Henkin, *Privacy and Autonomy* 74 Colum. L. Rev. 1410 (1974). And even autonomy has been protected only within a limited sphere: "matters relating to marriage, procreation, contraception, family relationships, and child-rearing and education." *Paul* v. *Davis,* 424 U.S. 693, 713 (1976). *See also Kelley* v. *Johnson,* —— U.S. —— [slip opn. at 6] (April 5, 1976); *Williams* v. *Kleppe,* 539 F.2d 803 (1st Cir. 1976). Privacy in the sense of freedom to withhold personal financial information from the government or the public has received little constitutional protection. *See, e.g., Fritz* v. *Gorton,* 83 Wash. 2d 275, 517 P.2d 911 (1974) (rejecting an elected official's attack on forced financial disclosure), *appeal dismissed,* 417 U.S. 902 (1974). *But cf. California Bankers Ass'n* v. *Shultz,* 416 U.S. 21, 78-79 (1974) (Powell, J., concurring); *City of Carmel-by-the-Sea* v. *Young,* 2 Cal.3d 259, 85 Cal. Rptr. 1, 466 P.2d 225 (1970).

This is not to say that there is no constitutional right to guard one's secrets. But the officers in the instant case do not claim that their financial affairs will be broadcast to the public, or even to other government agencies.[3] There is

[3] The Supreme Court has said that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45-46 (1957). But when a plaintiff under 42 U.S.C. § 1983 supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one. *See Hoitt* v. *Vitek,* 497 F.2d 598, 600 n. 1 (1st Cir. 1974); *Aubut* v. *Maine,* 431 F.2d 688 (1st Cir. 1970). We are not holding the pleader to an impossibly high standard; we recognize the policies behind rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.



little doubt that the Internal Revenue Service acted constitutionally in demanding the information supplied on the plaintiffs' tax returns. And society's interest in an honest police force is as strong as its interest in a self-reporting tax system.[4] Assuming for argument's sake that this sort of privacy deserves a special constitutional solicitude, the interests on the Commissioner's side outbalance a patrolman's right to withhold financial information. *Cf. Kelley* v. *Johnson,* —— U.S. —— (1976); *Williams* v. *Kleppe, supra,* 539 F.2d at 803.

Freedom from disclosure is also protected by more specific guarantees of the constitution. But these plaintiffs do not claim that disclosure is being used to punish or deter their exercise of other constitutional rights. *Cf. NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Shelton* v. *Tucker,* 364 U.S. 479 (1960). And even if the Fourth Amendment applies to this sort of intrusion, the Commissioner's order is not so lacking in justification as to be an "unreasonable" invasion of the patrolmen's "legitimate expectation of privacy". *See United States* v. *Miller,* —— U.S. —— [slip opn. at 8-9] (April 21, 1976). *Cf. Fisher* v. *United States,* —— U.S. —— [slip opn. at 7-9] (April 21, 1976). *See generally* Bogomolny, *The Right to Nondisclosure,* 5 Human Rights 153 (1976). The officers also point to their Fifth Amendment privilege against self-incrimination. This privilege is not infringed when public employees are dismissed for failing to answer questions "specifically, directly, and narrowly relating to the performance of their official duties . . . ." *Uniformed Sanitation Men Ass'n, Inc.* v. *Commissioner of*

[4] Even in the absence of any basis for suspicion on the part of the Commissioner, a requirement that police officers reveal their finances to the Commissioner serves the public interest in an honest force.

*Sanitation*, 392 U.S. 280, 284 (1968); *Gardner* v. *Broderick*, 392 U.S. 273 (1968). And questions about a policeman's finances are "specifically, directly, and narrowly" related to his job. Even a hint of police corruption endangers respect for the law. In order to establish an officer's probity, it may well be necessary to ask, as this questionnaire does, about several years' income and expenses as well as current assets. Information about other members of the officer's household must also be revealed if the questionnaire is to have meaning.

Appellants' second claim is that due process was violated when the Commissioner himself held a hearing to suspend the patrolmen for disobeying his order. This, they believe, was an unlawful combination of functions, conducive to bias. Any *per se* rule seems foreclosed by *Withrow* v. *Larkin*, 421 U.S. 35 (1975), which declared that claims of this sort must overcome a presumption that state administrators are fair and honest: the court must be convinced of a "risk of actual bias". *Id.* at 47. Appellants argue that *Withrow* does not control here because the Commissioner, rather than investigating conduct before judging it, "performed conduct which he then adjudged". Appellants seem to be advancing an unrealistically compartmentalized view of an administrator's job. *See generally Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, —— U.S. —— (June 17, 1976). Without evidence of bias, the Commissioner can constitutionally enforce his own orders by suspending those who disobey them.

*Affirmed.*



## Appendix C.

### Questions

1. Name, rank, and date of appointment.
2. Social Security numbers of you and your spouse.
3. Marital status and year of marriage, if married.
4. Number and age of your children, if any.
5. List all sources of income to you and your spouse during the calendar year 1972, including the following where appropriate:

Police salary
Other Police income (court time, overtime, details)
Bank and bond interest
Dividends
Real estate rents (give details)
Business income
Sale or exchange of real property
Sale or exchange of other property
Other sources (give details.)

6. Attach to this questionnaire a xerox or other photostatic copy of your Federal and Massachusetts state income tax returns for 1966, 1967, 1968, 1969, 1970, and 1971. If your date of appointment is later than 1965, do not attach any tax return for any year prior to your appointment. If you no longer have a copy of any return requested, a copy of your return is available from appropriate Federal and State authorities on your request.
7. Attach to this questionnaire a xerox or other photostatic copy of all bank statements, bank books, and deposit slips for the same years required by question #6, and also 1972.

8. Attach to this questionnaire a xerox or other photostatic copy of all brokerage accounts, deposit slips and statements for the same years required by question #7.

9. If you or any other member of your household has, during the same years required by question #7, maintained a safe deposit box, give the following information:

Name of lessee
Location
Person having access
Dates maintained

10. Itemize all assets in excess of $500 owned by you or any other member of your household during the years required by question #7, including, if any:

Airplane
Automobile
Boat
Jewelry, silver, or furs
Real Estate
Stocks or bonds

State the approximate value of each asset you list, including year of purchase and of sale if not still owned.

11. Without going into detail, approximate your cost of living for each of the years required by question #8, including, if appropriate:

Mortgage
Insurance premiums
Other debts



Educational expenses
Judgments against you
Medical expenses
Charitable contributions
Campaign contributions, including date, amount and name of candidate
Other expenses

12. Other information, if any, concerning your financial situation during the years required by question #8 which you believe the Board should know in connection with its inquiry but which is not covered by the previous questions.

I certify, under pain of disciplinary action by the Police Commissioner pursuant to the Rules and Regulations of the Boston Police Department, that the foregoing answers are true and complete to the best of my ability.

_____
Signature

Supreme Court, U. S.
FILED
APR 22 1977
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1292. **76-1062**

WILLIAM L. O'BRIEN ET AL.,
PETITIONERS,
*v.*
POLICE COMMISSIONER OF THE CITY OF BOSTON,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

**Brief for the Respondent in Opposition to Petition for Writ of Certiorari.**

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# Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1292.

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WILLIAM L. O'BRIEN ET AL.,
PETITIONERS,

*v.*

POLICE COMMISSIONER OF THE CITY OF BOSTON,
RESPONDENT.

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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**Brief for the Respondent in Opposition to Petition for Writ of Certiorari.**

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## Statement of the Case.

The plaintiffs in this action are three Boston Police Officers who were allegedly suspended without pay for one month for failure to obey an order that they complete and return a financial questionnaire. A copy of the financial questionnaire is included in the petition and marked "Appendix C." The plaintiffs seek to bring a class action on behalf of all individuals similarly situated. The complaint prays for a preliminary and permanent injunction against

any action requiring the plaintiffs to complete the questionnaire, a declaratory judgment and a judgment for alleged damages in the sum of one million dollars. The plaintiffs' request for a preliminary injunction was denied by Chief Judge Caffrey.

The defendant moved to dismiss the complaint. That motion was granted by the United States District Court for the District of Massachusetts. The granting of that motion was affirmed by the United States Court of Appeals for the First Circuit.

This memorandum is in opposition to the plaintiffs' Petition for a Writ of Certiorari to that Court of Appeals.

## Argument.

I. THE QUESTIONNAIRE DOES NOT VIOLATE THE PLAINTIFFS' CONSTITUTIONAL RIGHTS BECAUSE THE QUESTIONNAIRE IS SPECIFICALLY, DIRECTLY AND NARROWLY RELATED TO THE ABILITY AND FITNESS OF THE PLAINTIFFS TO PERFORM THEIR DUTIES AS POLICE OFFICERS.

The Massachusetts Supreme Judicial Court has specifically upheld the power of the Boston Police Commissioner to order members of the department to complete and return written reports. In *Broderick* v. *Police Commissioner of Boston*, Mass. Adv. Sh. (1975) 1838, 330 N.E. 2d 199, cert. denied, 423 U.S. 1048 (1976), the court reviewed the legality of an order that police officers answer questions relating to off-duty conduct and held that such questions did not violate the plaintiffs' constitutional rights. That power has also been upheld in many other decisions.

Both the Supreme Court of the United States and the Supreme Judicial Court of the Commonwealth have held that a police commissioner may, upon the threat of discharge or suspension, require a police officer to provide



information concerning his alleged misconduct. In *Silverio* v. *Municipal Court of Boston*, 355 Mass. 623, 628 (1969), cert. denied 396 U.S. 878 (1969), the Supreme Judicial Court said:

> "The Supreme Court of the United States in *Gardner* v. *Broderick*, 392 U.S. 273, 278, held that it was improper to discharge a police officer for refusal to waive immunity following his being told that he would be discharged if he did not do so. The court also held, however, that if a policeman 'had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution . . . the privilege against self-incrimination would not have been a bar to his dismissal.' "

The plaintiffs have not alleged in the complaint that the defendant required them to waive their rights under the Fifth Amendment. In fact, in this case, as in *Broderick*, the plaintiffs were informed that their responses could not be used in any criminal proceedings. See *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). In the absence of a requirement that there be such a waiver, it is clear that the suspension of the plaintiffs for failure to answer a questionnaire does not violate plaintiffs' Fifth Amendment rights. *Uniformed Sanitation Men Assoc., Inc.* v. *Commissioner of Sanitation of New York*, 392 U.S. 280, 284-285 (1968), *Gardner* v. *Broderick, Police Commissioner of New York*, 392 U.S. 273, 278 (1968), *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation of New York*, 426 F. 2d 619, 626-628 (2d Cir. 1970) cert. denied 406 U.S. 961 (1972).

The use of such a questionnaire is an accepted and well established practice. Personnel in Federal Law Enforce-

ment Agencies are required by federal regulations to submit financial questionnaires, 31 C.F.R. §§ 0735-70 and 0735-76, and 5 C.F.R. §§ 735401 and 735407, copies of which are attached hereto. The overwhelming majority of courts which have considered a challenge to the use of such questionnaires have ruled that public employees may be required to complete and return such questionnaires. For example, in *Sillifant* v. *Sheriff*, 6 N.Y. 2d 487 (1959), the New York Court of Appeals held that a New York City Building Department Inspector was properly convicted of criminal contempt for refusing to fill out a four-page financial questionnaire directed to him by a grand jury. "The questions are simple ones asking for details of the income of relator and members of his household, the names of banks in which he and his family have accounts, the existence of safe deposit boxes, life insurance and other policies, stock brokerage accounts and of his charge accounts, if any. The questionnaire calls also for approximate figures of living and personal expenses and for relator's financial balance sheet" (p. 489). The court stated that, "No one doubts that this grand jury . . . could compel this relator to answer. . ." these questions.

In his concurring opinion Judge Burke stated the principal more emphatically:

> "There is no question that where there is evidence of corruption that the people of the City of New York are entitled to an accounting by their public servants of the public employees' financial assets for the graft or corruption or misfeasance in office by their public servants—• • • Obviously, evidence of possession of financial assets or income in amounts or justified or accountable for by salary and other legitimate origins is a pertinent source of inquiry where the misconduct of a public officer is the subject of probe. • • • The best evidence of financial status would be a completed financial questionnaire, prepared by the public officer" (pp. 490-491).



Judge Burke then added that if questions are too complicated and involved, the employee may attack items on the questionnaire as being oppressive.

A more recent case upholding the use of financial questionnaires is *Fahy* v. *Commission to Investigate Allegations of Police Corruption,* 319 N.Y.S. 2d 242 (1971), aff'd without opinion, 319 N.Y.S. 2d 807 (Appellate Division) and aff'd without opinion 322 N.Y.S. 2d 73 (Court of Appeals). In that action, sergeants in the New York City Police Department sought an order quashing subpoenas requiring the sergeants to produce certain financial information including federal and state tax returns for 1967, 1968 and 1969 and all records of activity for the period from June 1, 1970 through November 5, 1970 including memoranda, books, pads, notebooks and telephone pads. The court quashed the subpoena insofar as the questionnaire included oppressive items seeking the exact amounts expended for the past three years by the employee, his wife, his dependents and for all others in whose behalf expenditures were made for such items as recreation, gas and oil, automobile tires, gifts, hobbies, tobacco and laundry. However, as to the production of tax returns, bank statements and records of brokerage accounts, the court refused to quash the subpoena and held that the question bear a reasonable relation to the purposes for which the Commission was created, namely to investigate allegations of corruption of members of the New York City Police Department.

In addition, several decisions of the Supreme Court of Illinois have upheld the legality of an executive order and a statute that require the filing of financial statements by public employees detailing the finances of the employee and

his immediate family. *Illinois State Employees Association* v. *Walker*, 315 N.E. 2d 9, 57 Ill. 2d 512 (1974); cert. denied sub. nom. *Troopers Lodge No. 41* v. *Walker*, 419 U.S. 1058, 43 U.S.L.W. 3329 (1974); *Stein* v. *Howlett*, 289 N.E. 2d 409, 52 Ill. 2d 570 (1972). In another similar case the Washington Supreme Court upheld a procedure for questioning police officers and requiring police officers to submit to a polygraph examination. *Seattle Police Officers' Guild* v. *Seattle*, 494 P. 2d 485 (Wash. S. Ct. 1972). See also *Kammerer* v. *Board of Fire and Police Commissioners of Lombard*, 256 N.E. 2d 12, 44 Ill. 2d 500 (1970), *In re Emmons*, 63 N.J. Super. 136 (Superior Ct. 1970). To the same effect are *People* v. *O'Brien*, 305 N.Y. 915 (1953), and *People* v. *Workman*, 308 N.Y. 668 (1954), both affirming perjury convictions of public employees who gave false answers to financial questionnaires before a grand jury.

The specialized nature of law enforcement agencies permits the use of financial questionnaires. Courts have recognized the special nature of police work. For example, the United States Supreme Court recently upheld hair regulations as applied to police. *Kelley* v. *Johnson*, 425 U.S. 238 (1976). See also *Board of Selectmen of Framingham* v. *Civil Service Commission*, Mass. Adv. Sh. (1974) 2389, 321 N.E. 2d 649, 655-656.

Federal courts have also recognized the difference between police and other public employees. In *Stradley* v. *Anderson*, 478 F. 2d 188, 190 (8th Cir. 1973), the court stated:

> "Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and oftentimes dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult task to lawfully act against those who are



> sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey strict disciplinary procedure and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority. As part of this discipline the police department has determined that an officer shall be neat in his appearance. There can be little argument that this requirement constitutes a legitimate departmental interest."

See also, *Dwen* v. *Barry*, 483 F. 2d 1126, 1129 (2d Cir. 1973) reversed on other grounds sub nom. *Kelley* v. *Johnson*, 425 U.S. 238 (1976); *Yarbrough* v. *Jacksonville*, 363 F. Supp. 1176, 1181-1182 (M.D. Fla. 1973) affirmed 504 F. 2d 759 (5th Cir. 1974); *Muller* v. *Conlisk*, 429 F. 2d 901, 904 (7th Cir. 1970).

A review of these cases, as well as the fact that such financial questionnaires are in wide use by federal law enforcement agencies, clearly indicates that the questionnaire is narrowly, specifically and directly related to the duties of the plaintiffs. Therefore, the use of these questionnaires does not violate the plaintiff's rights under the Fifth Amendment.

## II. The Financial Questionnaires do Not Violate the Plaintiffs' Right of Privacy.

A recent decision of the United States Supreme Court has held that the right of privacy is limited to "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Paul* v. *Davis*, 424 U.S. 693 (1976). In that case the court held that disclosure of an alleged shoplifter's arrest record did not violate a right of privacy. In addition the Illinois and Washington Supreme Courts have specifically held that a financial disclosure procedure for public employees does

not violate a right of privacy. *Illinois State Employees Association* v. *Walker*, 57 Ill. 2d 512, 315 N.E. 2d 9, 14-17 (1974), *Fritz* v. *Gorton*, 517 P. 2d 911 (Wash. S. Ct.), appeal dismissed for want of substantial federal question, 417 U.S. 902 (1974).

The complaint in this case alleges no disclosure of matters relating to marriage or family. By its nature the questionnaire is "financial." As such it does not intrude upon any area which is protected by a constitutional right of privacy.

III. The Court does Not Have Jurisdiction because the Plaintiffs Have an Adequate Administrative and Judicial Remedy Afforded by the Civil Service Laws.

The suspension of the plaintiffs is appealable to the Civil Service Commission and the state courts. Therefore, this court may not issue an injunction because the plaintiffs have a fair, adequate and unexhausted remedy. In *Soldevila* v. *Secretary of Agriculture of the United States*, 512 F. 2d 427, 430 (1st Cir. 1975), the court stated:

> The strong policy against enjoining incomplete agency actions, which is reinforced by the equity policy against enforcing personal service contracts and the disruptive effect of granting temporary relief in such cases, requires an extraordinarily strong showing of irreparable harm to warrant a preliminary injunction. *Sampson* v. *Murray*, 415 U.S. 61 . . . (1974).

It is a settled rule of equity that a plaintiff who seeks equitable relief must demonstrate that he lacks an adequate remedy at law and that absent injunctive relief he will suffer irreparable harm. *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974). This rule applies in cases where relief is sought under 42 U.S.C. § 1983. *Bonner* v. *Circuit Court of City of St. Louis, Mo.*, 526 F. 2d 1331, 1335-1336 (8th Cir. 1975), cert. denied 96 S.Ct. 1418 (1976).



The plaintiff may not circumvent or supplement the remedies afforded him by G.L. c. 31. Under G.L. c. 31, the plaintiff is afforded three ways of appealing a decision to impose discipline: (1) Request a hearing before the Civil Service Commission pursuant to § 43(*b*); (2) File a complaint with the Commission alleging procedural violations pursuant to the second paragraph of § 46A; or (3) File a complaint in the Supreme Judicial Court or the Superior Court alleging procedural irregularities pursuant to the first paragraph of § 46A. These are the only remedies available to the plaintiff; See *Police Commissioner of Boston* v. *Ciccolo*, 356 Mass. 555 (1969). The Supreme Judicial Court has repeatedly ruled that an employee who has been disciplined is required to follow the statutory scheme and may not file a complaint for an injunction, mandamus or declaratory judgment. *Brouillette* v. *Worcester*, 364 Mass. 444, 447, 306 N.E. 2d 252, 253 (1974); *Bergeron* v. *Superintendent, Walter E. Fernald State School*, 353 Mass. 331 (1967). This doctrine has been uniformly applied in analogous situations in which a plaintiff has an administrative remedy. See *East Chop Tennis Club* v. *Massachusetts Commission Against Discrimination*, Mass. Adv. Sh. (1973) 1611, 305 N.E. 2d 507; *The Coach and Six Restaurants, Inc.* v. *Public Works Commission*, 363 Mass. 643, 296 N.E. 2d 501 (1973); *County Commissioners of Middlesex County* v. *Sheriff of Middlesex County*, 361 Mass. 89, 278 N.E. 2d 751 (1972).

The Supreme Court in *Gibson* v. *Berryhill*, 411 U.S. 564, 575 n.14 (1973), recognized the need to deal with the exhaustion doctrine and stated that:

> State administrative remedies have been deemed inadequate by federal courts and hence not subject to

> the exhaustion requirements, on a variety of grounds. Most often this has been because of delay by the agency, *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587 (1926), or because of some doubt as to whether the agency was empowered to grant effective relief, *Union Pac. R. Co.* v. *Board of Comm'rs of Weld County*, 247 U.S. 282 (1918); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963). *Id.*

Other federal cases have held that a plaintiff in a § 1983 action may not seek federal judicial relief until the available and adequate state remedies have been exhausted. *Fuentes* v. *Roher*, 519 F. 2d 379, 386 (2d Cir. 1975). In *Burks* v. *Perk*, 470 F. 2d 163 (6th Cir. 1972), cert. denied 412 U.S. 905 (1973), the court held that a civil servant who had an adequate judicial remedy under state law could not seek federal relief.

The First Circuit has acknowledged that the exhaustion doctrine continues to apply to § 1983 cases. In *Raper* v. *Lucey*, 488 F. 2d 748, 751 n.3 (1st Cir. 1973), the court articulated a ripeness test which recognizes the need for a definitive administrative or institutional determination before a § 1983 action may arise. This test clearly recognizes that all exhaustion requirements cannot be ignored in a § 1983 action. In *Jackson* v. *Sargent*, 394 F. Supp. 162, 172-173 (D. Mass. 1975), the court held that:

> A § 1983 plaintiff must use any 'automatic' state judicial remedy that would entirely avert the harm of which he complains. Under some conditions, moreover, an aggrieved party might be required to use speedy and effective administrative procedures that might avert the harm before it occurs.
> *Id.* quoting *Wishart* v. *McDonald*, 500 F. 2d 1110, 1114 n.4 (1st Cir. 1974).



The ripeness test announced by the First Circuit in *Raper* v. *Lucey, supra,* was applied by the court in *Needleman* v. *Bohlen,* 386 F. Supp. 741, 746 (D. Mass. 1974). The court noted the need to defer to local institutional authority to assure that the action complained of be final within the institution in the sense that it is ripe for adjudication. See also *Stevenson* v. *Board of Education*, 426 F. 2d 1154, 1157 (5th Cir.), cert. denied 400 U.S. 957 (1970). In *Needleman* no hearing was offered to the plaintiff, the administrative action was definite, and the controversy was, therefore, ripe for adjudication.

In the present case the plaintiffs have attempted to "short-circuit" the administrative framework provided for their protection in G.L. c. 31. They are entitled to request the *de novo* hearing before the Civil Service Commission granted by G.L. c. 31, § 43(*b*). The administrative action is not final or definite in the present case, for the findings of the Police Commissioner at the department trial board may be modified or rejected by the Civil Service Commission. The plaintiffs have chosen to interrupt the normal administrative procedure and have proceeded directly to the federal court. The concerns of comity and ripeness militate against the abandonment of an incomplete administrative process and the premature involvement of federal courts in state administrative procedure.

In this case the plaintiffs have a fair and adequate remedy provided by the civil service laws of Massachusetts, G.L. c. 31, §§ 43 et seq. Those remedies are established to protect the statutorily created tenure of public employees. The plaintiffs must allow this administrative framework to articulate a definite result before resorting to the federal courts.

## IV. The Procedures Used to Suspend the Plaintiffs did Not Violate the Plaintiffs' Due Process Rights.

The complaint alleges that the Police Commissioner violated the rights of the plaintiffs by holding a hearing at which he presided and by not applying formal rules of evidence. Such a procedure is, however, required under the Civil Service Statutes of Massachusetts. General Laws, c. 31, § 43, mandates that the first hearing as to a suspension or discharge must be before the "appointing authority." The appointing authority is the person legally empowered to hire and fire. The person who has such power over the plaintiff patrolmen is the defendant Police Commissioner. See St. 1962, c. 322. The Civil Service laws also provide for a "de novo" hearing on appeal before the Civil Service Commission which has the authority to order the reinstatement of the employee "without loss of compensation." G.L. c. 31, § 43(*b*). Such a review procedure clearly complies with due process.

There is no requirement that formal rules of evidence apply at the administrative civil service hearings. The Administrative Procedures Act of Massachusetts recognized that formal rules of evidence should not apply to administrative agency hearings. That law, G.L. c. 30A, § 11(2), provides that "agencies need not observe the rules of evidence observed by courts." See also McCormack, *Evidence*, § 350, p. 843. The requirements of due process is that the hearing be "fair" and not that all of the machinery of a criminal trial be incorporated in the hearing. *Allen* v. *Greensboro, North Carolina*, 452 F. 2d 489 (4th Cir. 1971). In this case, there can be no showing that the hearings were not fair.

In addition, the United States Supreme Court has held that there is no violation of due process where a public



agency combines both the investigation and adjudicative function, *Withrow* v. *Larkin*, 421 U.S. 35 (1975). See generally *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482 (1976).

The complaint fails to allege any specific bias toward the individual plaintiffs, but merely alleges in effect that the Police Commissioner, because of the duties of his office, violated the plaintiffs' due process right by conducting the civil service hearing. That is not a situation involving a "Biased decisionmaker" referred to in *Withrow* at p. 47. The Police Commissioner is compelled by law to administer the Boston Police Department and to conduct civil service hearings. General Laws, c. 31, § 43(*a*) provides that civil service hearings must be held before the "appointing authority." The definition of "appointing authority," in G.L. c. 31, § 1, is that officer who has the power to hire and fire. Therefore, the Police Commissioner, by virtue of St. 1962, c. 322, is the only person who is the appointing authority. Failure to conduct the hearing before the Police Commissioner may render a disciplinary action null and void. See *Cullen* v. *Mayor of Newton*, 308 Mass. 578, 582-583 (1941). In addition, all department rules and guidelines are "orders" of the police commissioner. Therefore, a decision from this court which precludes the Police Commissioner from conducting hearings will, in effect, prevent the imposition of any discipline for violation of rules or guidelines for the Boston Police Department as well as for all of the Departments, and all of the State and Local governments. Clearly, the procedure followed by the Police Commissioner is not a violation of due process.

## V. The Complaint in the Present Case Fails to Allege Sufficient Facts upon Which a Claim for Relief may be Granted and is Subject to Dismissal under Fed. R. Civ. P., Rule 12 (b)(6).

The motion to dismiss for failure to state a cause of action, Fed. R. Civ. P., Rule 12(b)(6), calls upon the court to separate legal conclusions from well-pleaded facts in evaluating the plaintiff's complaint. While the court is bound to accept as true all well-pleaded facts, it is clear that the court may refuse to accept legal conclusions, unsupported conclusions, unwarranted inferences and deductions, or sweeping legal conclusions cast in the form of factual allegations. Wright and Miller, *Federal Practice and Procedure*, § 1356, at pp. 594-596 (1969). Although well-pleaded facts are deemed admitted for the testing of the complaint's sufficiency, such an admission does not include legal conclusions drawn from these facts. *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U.S. 54, 57 (1938). Where a complaint is entirely conclusory and alleges no facts upon which a court could find a denial of constitutional rights, a motion to dismiss filed pursuant to Fed. R. Civ. P., Rule 12(b)(6) should be granted. *Avins* v. *Mangum*, 450 F. 2d 932, 933 (2d Cir. 1971).

The plaintiffs strongly rely on language in the case of *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The opinion in *Conley* states that a complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Although this rule may apply in some cases, it has recently been distinguished in a case quite similar to the case at bar. In *Lyons* v. *Gilligan*, 382 F. Supp. 198 (N.D. Ohio 1974), the court considered the plaintiff's reliance on the language in *Conley* but held the rule not



to be applicable and dismissed the case. The *Lyons* court was faced with a complaint which alleged the denial of the Constitutional right to privacy and the imposition of cruel and unusual punishment in violation of the Eighth Amendment. The defendants moved for a dismissal pursuant to Rule 12(b)(6) of the Fed. R. Civ. P. The plaintiffs contended that no dismissal should be granted due to the rule in the *Conley* case. The court granted the motion to dismiss and answered the plaintiffs' contention in the following statement:

> Because these claims turn on constitutional considerations that may be fully tested in light of the facts alleged in the complaint and accepted as true for the purpose of considering the defendant's motion to dismiss, it is concluded that this case does not fall within that rule. *Lyons, Id.*, at p. 199.

The plaintiffs also cite *Gillibeau* v. *Richmond*, 417 F. 2d 426, 430 (9th Cir. 1969), as standing for the proposition that a dismissal may only be granted in a civil rights suit if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The facts of the *Gillibeau* case distinguish it from the case at bar. In *Gillibeau*, the defendants were challenging the plaintiff's ability to comply with the rule governing class actions [Fed. R. Civ. P., Rules 23, 23(a)(1-4)(b)]. *Id.*, at p. 432. The allegations in the complaint involved complex issues of conspiracy, unreasonable search and seizure, and interference with the right to assemble. The case at bar involves no such complex factual allegations. The holding in *Gillibeau* was further refined by the court in *Mastandrea* v. *Gurrentz International Corp.*, 65 F.R.D. 52 (D. Pa. 1974). The opinion in *Mastandrea* referred to the *Gillibeau* case but added that, "if allegations in

complaint, taken as true do not effectively state a claim, added assertion by the plaintiff that they do state a claim will not save complaint." *Id.*, at p. 54.

A motion to dismiss will be granted where it is clear that, even if the facts alleged in the complaint are true, there is no deprivation of a Constitutional right. *Hahn* v. *Sargent,* 388 F. Supp. 445, 450 (D. Mass. 1975); aff'd 523 F. 2d 461 (1st Cir. 1975) cert. denied, 96 S. Ct. 1495 (March 29, 1976). This is particularly true where the law does not support the plaintiff's case and clearly points in favor of the defendant's case. *Mellon National Bank & Trust Co.* v. *Nationwide Mutual Insurance Co.*, 32 F.R.D. 365, 366 (W.D. Pa. 1962).

## Conclusion.

For the above stated reasons, the Petition should be denied.

Respectfully submitted,

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## Appendix.

CODE OF FEDERAL REGULATIONS.

*Title 31—Money and Finance: Treasury.*

STATEMENT OF EMPLOYMENT AND FINANCIAL INTERESTS.

§ 0.735-70 Employees required to submit statements.

Except as provided in § 0.735-71 statements of employment and financial interests will be filed by the following employees:

(a) Those paid at a level of the Executive Schedule in Subchapter II of Chapter 53 of Title 5, United States Code.

(b) Those classified at GS-13 or above under 5 U.S.C. 5332, or at a comparable pay level under another authority, who are in positions, specifically identified in Appendix A to this part, the incumbents of which are responsible for making a Government decision or taking a Government action in regard to:

(1) Contracting or procurement;

(2) Administering or monitoring grants or subsidies;

(3) Regulating or auditing private or other non-Federal enterprise; or

(4) Other activities where the decision or action has an economic impact on the interests of any non-Federal enterprise.

(c) Those classified at GS-13 or above under 5 U.S.C. 5332, or at a comparable pay level under another authority, who are in positions, specifically identified in Appendix A to this part, which the Secretary of the Treasury has determined have duties and responsibilities which require the incumbent to report employment and financial interests in order to avoid involvement in a possible conflicts-of-interest

situation and carry out the purpose of law, Executive order, 5 CFR Part 735, and this part.

(d) Those classified below GS-13 under 5 U.S.C. 5332, or at a comparable pay level under other authority, who are in positions which otherwise meet the criteria in paragraphs (b) and (c) of this section, but only when the inclusion of the positions in Appendix A to this part has been specifically justified by the Secretary of the Treasury in writing to the Civil Service Commission as an exception that is essential to protect the integrity of the Government and avoid employee involvement in a possible conflicts-of-interest situation.

(e) Alterations to, deletions from, and other amendments of the list of positions in Appendix A to this part may be made under the criteria in paragraphs (b) through (d) of this section and are effective upon approval by the Secretary of the Treasury and actual notification to the incumbents. Amendments to the list in Appendix A of this part shall be submitted annually for publication in the FEDERAL REGISTER.

§ 0.735-76 Interests of employees' relatives.

For purposes of completing the statements of employment and financial interests, the interest of a spouse, minor child, or other member of the employee's immediate household is to be considered an interest of the employee. In other words, those blood relations who are residents of the employee's household are to be treated for purposes of completing the financial statement as though they were the employee and therefore, the report of financial statements should reflect their employment and financial interests in the same manner that the employment and financial interests of the employee are shown.



*Title 5—Administrative Personnel.*

## Subpart D—Agency Regulations Governing Statements of Employment and Financial Interests

§ 735.401 Form and content of statements.

The statements of employment and financial interests required under this subpart for use by employees and special Government employees shall contain, as a minimum, the information required by the formats prescribed by the Commission in the Federal Personnel Manual. An agency shall not include questions on a statement of employment and financial interests that go beyond, or are in greater detail than, those included on the Commission's formats without the approval of the Commission.

§ 735.407 Interests of employees' relatives.

The interest of a spouse, minor child, or other member of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.